No. 79-544

In the Supreme Court of the United States

OCTOBER TERM, 1979

PENNSYLVANIA ELECTRIC COMPANY,
METROPOLITAN EDISON COMPANY, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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Petitioners, electric utility companies that are subsidiaries of General Public Utilities Corporation, contend that the court of appeals erred in affirming orders of the Federal Energy Regulatory Commission rejecting temporary surcharges filed as part of wholesale electric tariffs to collect fuel costs in addition to those recovered under the automatic fuel adjustment clauses included in the tariffs.[1]

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[1]The opinion of the court of appeals is reported as *Public Service Company of New Hampshire* v. *FERC*, 600 F. 2d 944 (D.C. Cir. 1979). It is set forth at pages 1a-45a of the appendix to the petition for a writ of certiorari in *Public Service Company of New Hampshire* v. *FERC*, No. 79-169. That appendix which contains the opinions of the court of appeals and the Commission in related cases will be referred to as "PSNH App."

1. Pennsylvania Electric Company (Penelec), in 1973, and Metropolitan Edison Company (Met Ed), in 1974, filed tariffs containing fuel adjustment clauses (PSNH App. 39a-42a) that became effective in those years. The clauses provided that a fuel cost adjustment factor, determined "to the nearest one-thousandth of 1 mill per kilowatt-hour in accordance with the formula set forth below, shall be applied to all kilowatt-hours supplied during the billing month" (*id.* at 39a). The formulas listed various components, including a predetermined base period fuel cost per kilowatt-hour, and factors for actual fuel costs, kilowatt-hours generated, and sales thereof in the "current" period (*ibid.*). They also provided that the latter three factors were "to be determined as the three month totals for the period ending with the second calendar month preceeding the billing month" (*id.* at 40a, 42a). Thus, for example, under the formulas bills for kilowatt-hours supplied in June contained an adjustment based on fuel costs actually incurred in a prior period: January, February and March.

Met Ed, on October 31, 1975, and Penelec, on November 26, 1975, filed new fuel adjustment clauses designed to conform to the Commission's Order No. 517 (18 C.F.R. 35.14), which also contained an increased base fuel rate (Pet. App. 16a). On January 28, 1976 and April 8, 1976, Met Ed and Penelec, respectively, filed proposed temporary surcharges to recover fuel costs which the utilities claimed had become uncollectable as a result of the new, higher base rate, because of the three month "lag" in the fuel adjustment clauses (Pet. App. 13a-14a, 18a-19a). It is the lawfulness of the surcharges that is at issue in this case.

Met Ed and Penelec claimed that the surcharges were designed to permit them to recover fuel costs actually incurred during the last four months that the superseded

fuel adjustment clauses were in effect. They contended that, without the surcharges, recovery of those costs would be lost because they could not be recovered under the superseded tariffs (which would apply to the billing for power delivered for those months) in view of the provision in those tariffs providing that cost factors in the adjustment formula were to be based on costs "for the period ending with the second calendar month preceding the billing month" (PSNH App. 40a, 42a). The utilities argued that this surcharge was permissible because the superseded fuel adjustment clauses were intended to defer the recovery of the costs incurred in the current billing month to later months, and claimed that the surcharges simply permitted the recovery of deferred costs that would have been recoverable under the superseded tariff (J.A. 428-442, 513-530).[2] The wholesale customers and Commission trial staff argued that the tariff simply used past fuel costs as a measure of current charges, and that no costs were deferred (J.A. 444-457, 536-554).

In initial decisions after hearings under Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), the administrative law judges held that the surcharges were not just and reasonable (J.A. 486-492, 579-587). The Commission agreed (Pet. App. 6a-28a). The court of appeals affirmed the Commission's orders in a consolidated proceeding (PSNH App. 1a-45a), rehearing denied (Pet. App. 5a).

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[2] "J.A." refers to Volume II of the joint appendix in the court of appeals which contains the relevant portions of the records of the proceedings before the Commission regarding Met Ed's and Penelec's surcharges.

2. The considerations that warranted denial of the petition for a writ of certiorari in *Jersey Central* v. *FERC*, No. 78-1665 (Oct. 1, 1979), equally apply to this case. Also applicable here are the points elaborated in our brief in opposition to the petition in *Public Service Company of New Hampshire* v. *FERC*, No. 79-169, one of the cases consolidated with the instant proceedings before the District of Columbia Circuit.

As in *Jersey Central, supra*, and *Public Service Company of New Hampshire, supra*, the issue is one of characterization: did Met Ed's and Penelec's superseded fuel clauses provide for deferred recovery of costs actually incurred, as in a cost-of-service tariff, or for recovery on the basis of costs in a specific period, as in a fixed rate tariff?

The superseded fuel clauses of Met Ed and Penelec are identical in their pertinent terms to that of their affiliate, Jersey Central, which is also a subsidiary of General Public Utilities (*Jersey Central*, No. 78-1665, Pet. App. 1a-2a). That clause was found by the Commission to be a fixed rate type tariff which recovered "costs for a given month based on costs incurred during a prior test period" (FERC Br. in Opp. in *Jersey Central*, No. 78-1665, at 10).

The Commission found that Met Ed's and Penelec's prior fuel clauses were also similar in operation to the fuel clauses of Public Service Company of New Hampshire (PSNH), which the Commission held in its Opinion No. 790 to be "a fixed rate tariff, which provides current compensation on the basis of costs incurred during a past period" (PSNH App. 61a). In the case of Penelec, the Commission expressly found (Pet. App. 24a):

> The only factual difference of any consequence (for the purposes of this decision) between this case and opinion No. 790 is one, as discussed above, that makes Penelec's case even weaker.

That factual difference was that Penelec, unlike PSNH, had not eliminated the lag in its fuel clause (Pet. App. 18a). The increase in the base fuel rate simply meant that more of the fuel costs were recovered through the base rate instead of through the adjustment charge: the total rate per kwh remained the same (Pet. App. 19a). There could therefore be no fuel costs which Penelec was precluded from recovering because of the increase in the base fuel rate in its fuel adjustment clause and thus no "skipped over" costs to be recovered by means of a surcharge (Pet. App. 19a). Penelec's proposed surcharge was therefore rejected (Pet. App. 24a). Since the Commission found that Met Ed's superseded fuel clause and its proposed surcharge were identical in all relevant respects to Penelec's, the Commission properly relied on the reasoning in the Penelec order to approve the initial decision and reject Met Ed's proposed surcharge (Pet. App. 7a).

The courts of appeals in both *Jersey Central Power & Light Co.* v. *FERC*, 589 F. 2d 142 (3d Cir. 1978) and *Public Service Company of New Hampshire, supra*, agreed with the Commission's interpretation of the superseded fuel clauses used by Met Ed and Penelec. See FERC Br. in Opp., *Jersey Central*, No. 78-1665, at 10-11. FERC Br. in Opp., *Public Service Co. of New Hampshire*, No. 79-169, at 8-9.

Having found Met Ed's and Penelec's superseded fuel adjustment clauses to have been fixed rate tariffs, the Commission correctly concluded that the Federal Power Act precludes approval of the surcharges. This conclusion rests on the rule against retroactive ratemaking and the related "filed rate doctrine" that a utility may charge only those rates set forth in tariffs on file with the Commission. See FERC Br. in Opp. in *Jersey Central*, No. 78-1665, at 11-12.

As we explained in our briefs in opposition in *Jersey Central* (at 12-14) and in *Public Service Co. of New Hampshire* (at 10), we believe that the conflict between the decision of the court of appeals in these proceedings and that of the First Circuit in *Maine Public Service Co.* v. *FPC*, 579 F. 2d 659 (1978), does not warrant this Court's present review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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